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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.K., a Person Coming Under
the Juvenile Court Law.

B290653

(Los Angeles County
Super. Ct. No. 18CCJP02375)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.K.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Pete R. Navarro, Juvenile Court Referee. Affirmed.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Aileen Wong, Senior Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court took jurisdiction over one-year-old A.K., the son of C.K. (Father), based on his parents' history of domestic abuse. We are asked to decide whether the disposition order removing A.K. from Father's custody is supported by substantial evidence. We also decide whether the trial court abused its discretion by ordering Father to submit to drug testing as part of the court's disposition order.

I. BACKGROUND

A. *The Domestic Violence Episode*

On February 1, 2018, at approximately 3:00 p.m., A.K.'s mother (Mother) called 911 after an argument with Father escalated into physical violence. At the time, Mother and Father had been in a relationship for three years.

According to Mother's statement given to police officers who responded to the 911 call, Mother and Father were arguing while sitting in Father's car with A.K. Mother got out of the car with A.K. in her arms and Father threw a hamburger at them. Mother then began walking toward her home, which was nearby, and Father moved to get in front of her. Mother kicked Father in response, and he threw a cup of soda which struck both Mother and A.K.

When Mother reached her home, Father forced his way inside and refused to leave. Mother then attempted to push Father out of her front door and Father grabbed Mother, put his right hand over her mouth, and put his left arm around her throat—choking her for about 10 seconds. While having difficulty breathing, Mother bit Father's hand, but he did not remove his

hand from her mouth. Eventually, when Mother stopped fighting back, Father released her and left the residence.

Father re-entered Mother's home as she was on the phone with the 911 operator. Father took the phone from Mother, told the operator "everything was ok," and then left the residence with Mother's phone "to prevent [Mother] from calling 911."

Soon thereafter, officers from the Los Angeles Police Department arrived at Mother's residence. She told them she had been a victim of Father's domestic violence on five prior occasions, two of which she had reported to the authorities. Elaborating, Mother told the officers that Father previously threatened her with a weapon, threatened to kill her, and strangled her. The police officers observed Mother was "shaking," "crying," "scared," and "angry," when they interviewed her.

Los Angeles County Department of Children and Family Services (Department) social workers subsequently began an investigation and separately interviewed Mother, Father, and A.K.'s maternal grandmother, with whom A.K. and Mother lived.¹ During her interviews, Mother described the February 1, 2018, domestic violence episode much as she had described it to the police, but she added that when Father had his arms around her she hit his arm with a broom and broke the broom. With regard to prior incidents, she confirmed that Father had previously hit and strangled her, but she denied telling the police that Father ever threatened to kill her or harm her with a weapon. She also told the social worker that she was not afraid of Father.

¹ Mother's then two-year-old daughter, N.T., also lived with the maternal grandmother. Father is not N.T.'s biological father.

Mother told the social worker that she did not plan to get a restraining order against Father because they were no longer in a relationship and she would not allow him back in her home. In a conversation with the Department two weeks later, however, Mother revealed she had changed her mind and was planning on again living with Father. Mother explained her reasoning as follows: “I think he can change. We already talked about it. I’ve gotten over it. I can’t live alone. He’s been bringing diapers. He’s gonna do classes.”

During her interviews with Department personnel, Mother also discussed Father’s drug use, and hers. She admitted that while both she and Father used marijuana regularly, they did so in smaller quantities than before.

Father, during his Department interview, admitted he threw a hamburger at Mother and A.K., but he suggested the action was justified because Mother first threw her drink on his car. Father also conceded he grabbed Mother’s hands once they were inside her residence, but Father denied striking or assaulting her. Father characterized the incident as a “food fight” and maintained “[M]other lied to law enforcement and made a big deal about something very minor.”

With regard to prior domestic violence, Father stated he never threatened to kill Mother, never threatened her with a weapon, and never strangled her. Father described Mother as, among other things, “bipolar, needy, angry” and violent. Father elaborated: “When she loses her cool, she loses her cool. I can expose her in a court room. I’ve never reported her. She’s hit me before but I don’t want her to get in trouble.” Father refused the suggestion that he take domestic violence classes, stating, “I don’t need it.” And as for Father’s marijuana use, he confirmed he

used the drug to treat headaches and to relieve stress, but he claimed he did not use the drug around A.K. and his sister.

The maternal grandmother, in her interview, stated Father no longer lives with her, her daughter, and her grandchildren because of a prior domestic violence incident in which Father slapped Mother in front of A.K and his sister, an incident that made the children cry. In response to that incident, the maternal grandmother kicked Father out of her home.

In addition to conducting individual interviews, the Department interviewed Mother and Father together during an announced home visit. Early in that interview, Mother asked if she could “take . . . back” the police report she filed in connection with the February 2018 domestic violence incident. As the interview progressed, however, Mother and Father began bickering, with Mother telling Father to “shut the fuck up.” Father then “continuously talked about how the police report is false and . . . [Mother] loudly said, ‘It’s not a false report.’”

B. The Dependency Petition and the Detention Hearing

The Department filed a dependency petition pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b).² The petition alleged Mother and Father’s history of violence and substance abuse placed A.K. and his sister at risk of serious physical harm.

The juvenile court held a detention hearing on the petition and found the Department had made a prima facie showing that A.K.’s “continuance in the [care] of [Father] is contrary” to A.K.’s

² Undesignated statutory references are to the Welfare and Institutions Code.

welfare. As a result the court ordered A.K. detained from Father. The court released A.K. to Mother on the condition that she reside with A.K.'s maternal grandmother, without Father in the home. The court ordered monitored visitation between A.K. and Father and scheduled a jurisdiction and disposition hearing.

In advance of that hearing, a Department dependency investigator re-interviewed Mother. Her statements concerning Father and domestic violence differed from what she said during prior interviews. Picking up on Father's earlier characterization, Mother now described the February 2018 incident as "a 'food fight.'" She claimed she was the one who had tried to get physical with Father and he only "restrained" her—she specifically denied Father choked her. As for the pre-February 2018 domestic violence she had previously described, Mother said she was to blame for what happened, explaining that she was "hormonal," "depressed," and "going through a phase." Mother denied that Father had ever hit her during any of those prior incidents and instead stated he would only hold her hands during the incidents to help her "calm down."

In a telephone conversation with the dependency investigator following the detention hearing, Father declined to participate in a follow-up interview; he preferred instead to "clear . . . up" the allegations against him in court.

C. The Jurisdiction and Disposition Hearing

In June 2018, the juvenile court held a combined jurisdiction and disposition hearing. The court admitted Department reports in evidence and heard testimony from both Mother and Father.

With regard to the February 2018 episode, Mother admitted she poured a drink onto the trunk of Father's car, tried to kick him, hit him with a broom, and bit his hand. She also admitted that, in response, Father threw a hamburger and a soda at her and A.K. Although Mother acknowledged she told the police and a Department social worker that Father choked her during the incident, she testified at the hearing that Father did not choke her but he did "restrain[]" her. Mother stated Father's hand was over her mouth for only two seconds, not 10 seconds as she had told the police and the Department's social worker. According to Mother, Father needed to restrain her because she was "so mad" and "just out of control." In addition, Mother denied there were any instances of domestic violence between her and Father before what happened in February 2018.

Father testified he recalled Mother pouring lemonade on the back of his car but did not recall throwing a hamburger at Mother and A.K. Father admitted he got angry and "a little out of character" when Mother poured her drink on his car, but he denied "do[ing] anything crazy." Father also denied forcing himself into Mother's residence, although he agreed he did restrain Mother after she hit him with a broom. He explained that he did not wait to talk to the police because he was "already late for work."

After hearing the parents' testimony, the juvenile court sustained an amended version of the domestic violence claim alleged under section 300, subdivision (b), finding "both parents . . . at fault here." As amended, the operative domestic violence allegation provided, in pertinent part, as follows: "[Mother and Father] have a history of engaging in violent altercations On or about 02/01/2018, [Father] covered

[Mother's] mouth with [his] right hand and [Mother] bit [Father]. [Father] threw a hamburger and it struck [Mother's] chest and the child, [A.K.]. [Mother] kicked [Father's] buttocks area with [her] right leg. [Mother] struck [Father's] arm with a broom stick. [Mother] scratched and bit [Father's] hand. On prior occasions, [Mother] and [Father] struck each other. [Mother] failed to protect the children by continuing to allow [Father] to have unlimited access to the children. Such violent altercations between the parents endangers the children's physical health and safety and place the children at risk of serious physical harm, damage, danger and failure to protect." The juvenile court dismissed the petition counts alleging harm to A.K. inflicted non-accidentally by a parent (the section 300, subdivision (a) count) and substantial risk of serious harm to A.K. stemming from marijuana use (the second and third section 300, subdivision (b) counts).

With regard to disposition, counsel for the Department acknowledged the court found the domestic violence between the parents was a "two-way street," but still opposed a "home of the father" order because it saw "a lot of issues of control with [Father], a lot of issues of the typical domestic violence pattern with [Mother] being very protective of [Father] and covering for [Father]." As a result, the Department believed more time needed to pass and more participation in programming by Father needed to occur before A.K. could be returned to Father's care. The juvenile court agreed with the Department's assessment that Father had "power . . . [and] control issues" and found by clear and convincing evidence that there was a substantial danger to A.K. if he were returned to Father's care. The court ordered A.K.

placed solely in Mother's custody, with monitored visitation for Father.

As for the parents' substance abuse, the Department asked the court to order both parents to submit to drug testing. Specifically, as to Father, the Department requested "six tests with lowering levels of marijuana" due to the young ages of A.K. and his sister. The juvenile court adopted that recommendation and made it part of its disposition order.

II. DISCUSSION

Although Father concedes A.K.'s placement with Mother was appropriate, he maintains the juvenile court erred in removing A.K. from his custody. In Father's view, because the court found both of A.K.'s parents "involved" in the domestic violence, there was "no valid basis for the juvenile court to have treated them differently in terms of the removal order."

We believe the juvenile court's removal order was appropriate. Substantial evidence in the record justifies a judgment that, while both parents engaged in domestic violence, they posed different risks to A.K.—and the removal order accounts for these differences. We additionally hold the juvenile court was within its "broad discretion" (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 186-187) (*Natalie A.*), notwithstanding its dismissal of the substance abuse counts of the dependency petition, to order Father to participate in drug testing because of the risk an impaired parent may pose to a young child like A.K.

A. *Substantial Evidence Supports the Order Removing A.K. from Father's Custody*

Before the juvenile court may order a child removed from the care of a noncustodial parent, it must find by “clear and convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child.” (§ 361, subd. (d).) “A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. [Citation.] ‘The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.’ [Citation.] The court may consider a parent’s past conduct as well as present circumstances. [Citation.]” (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170.)

A juvenile court must find that removal of a child from his or her parent is supported by clear and convincing evidence, but that standard “is for the edification and guidance of the trial court and [is] not a standard for appellate review.” (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880 (*Sheila S.*), citing *Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) We review a challenge to a removal order for substantial evidence. (*In re Francisco D.* (2014) 230 Cal.App.4th 73, 80.) In other words, “on appeal from a judgment required to be based upon clear and convincing evidence, ‘the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.’ (9 Witkin, Cal. Procedure

(4th ed. 1997) Appeal, § 365, p. 415.)” (*Sheila S.*, *supra*, at p. 881; accord, *In re F.S.* (2016) 243 Cal.App.4th 799, 811-812.)

The juvenile court’s decision to remove A.K. from Father’s care, while simultaneously placing A.K. with Mother, was supported by substantial evidence. First, with regard to the domestic violence that triggered the filing of the dependency petition, each parent participated in the violence but it was only Father who used violence that directly and physically impacted A.K.: Father threw at least one, and possibly two, objects at Mother while A.K. was in her arms, striking both of them. Second, with regard to pre-February 2018 incidents of domestic abuse, Mother told police and the Department there were several such incidents, including times when Father hit and strangled her. Mother’s statements were supported, in part, by the maternal grandmother, who witnessed one such incident (Father slapping Mother in the children’s presence). The fact that Mother later backtracked on her statements and offered different testimony at the jurisdiction and disposition hearing is of no consequence for, on appeal, we view the record in the light most favorable to the juvenile court’s determinations.³ (*In re R.T.* (2017) 3 Cal.5th 622, 633.)

In addition, contrary to Mother, who acknowledged her role in the altercation that triggered the dependency petition, Father

³ The record reveals the juvenile court did not credit Mother’s testimony denying no past violence between her and Father. The amendments the court made to the dependency petition retained its allegation that there was domestic abuse between Mother and Father that predated the February 2018 incident.

testified he could not recall throwing a hamburger at Mother and A.K.—even though he had previously admitted doing so when interviewed by a Department social worker. In the same vein, Mother expressed a willingness to participate in domestic violence classes while Father did the opposite—he denied ever striking Mother and refused to participate in any domestic violence classes. The juvenile court also appropriately found Father to have power and control issues (borne out in part by his interruptions in court), but it made no such similar finding with regard to Mother.

These are all differentiating facts that justify the court’s order removing A.K. from Father’s custody. Substantial evidence demonstrates that, while both of A.K.’s parents had a propensity to resort to domestic violence, there were tangible differences between the two and, as a result, different risks to A.K.’s safety and well-being. The juvenile court appropriately decided to tailor its disposition order accordingly.

B. The Juvenile Court’s Drug Testing Order Was Within Its Discretion

The juvenile court may make “all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child.” (§ 362, subd. (a).) In addition, the juvenile court at disposition “may direct any reasonable orders to the parents . . . of the child . . . as the court deems necessary and proper to carry out this section.” (§ 362, subd. (d).)

“The problem that the juvenile court seeks to address need not be described in the sustained section 300 petition.” (*In re Briana V.* (2015) 236 Cal.App.4th 297, 311.) To the contrary, “[t]he juvenile court has broad discretion to determine what

would best serve and protect the child's interests and to fashion a dispositional order accordingly. On appeal, this determination cannot be reversed absent a clear abuse of discretion.'

[Citation.]" (*Natalie A.*, *supra*, 43 Cal.App.4th at pp. 186-187.)

In re Christopher H. (1996) 50 Cal.App.4th 1001, illustrates the breadth of a juvenile court's discretion to make disposition orders. In that case, the Department of Social Services filed a petition alleging the child's father had alcohol-related problems that negatively affected his ability to care for the minor. (*Id.* at p. 1005.) Two additional counts in the petition alleged other bases for dependency jurisdiction and the juvenile court sustained those counts while finding not proven the allegation that the father's alcohol problems put the minor at risk. (*Ibid.*) Although it did not sustain the alcohol-related count for jurisdictional purposes, the court ordered the father to undergo a substance abuse evaluation, to participate in any recommended treatment, and to submit to random drug or alcohol testing. (*Ibid.*) The Court of Appeal affirmed these conditions of the disposition order, holding that the father's "substance abuse problems pose a potential risk of interfering with his ability to make a home for and care for [the minor]." (*Id.* at p. 1007.)

Here, it is undisputed Father used marijuana. Given the very young ages of A.K. and his sister at the time (one and two years old, respectively), the court did not abuse its discretion in ordering Father to undergo a limited number of drug tests to show, not the absence of any marijuana use, but merely a decreasing level of usage. As in *In re Christopher H.*, the juvenile court reasonably concluded that, although Father's marijuana use was not a protective issue, Father's continued use at then-

current levels could pose a potential risk of interfering with his ability to care for A.K.⁴

DISPOSITION

The juvenile court's disposition order is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.

⁴ We are not persuaded, as Father argues, that this is a case like *In re Jasmin C.* (2003) 106 Cal.App.4th 177. In that case, another division of this court reversed an order requiring a non-offending parent to attend parenting classes because “nothing in the record supported the order.” (*Id.* at p. 181.) Father is not a non-offending parent and, more critically, there is evidence in the record of marijuana use that supports the testing condition the juvenile court imposed.